His Lordship further added:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the Accused will suffice.

Applying the above principles of law to the instant case, I hold that the defence has cast a reasonable doubt in the prosecution's case. The prosecution, therefore has failed to prove the charge of trafficking against the Accused.

I therefore acquit and discharge the Accused.

RAFIAH BT. A. BAKAR

v.

EAST WEST-UMI INSURANCE BHD.

HIGH COURT, JOHOR BAHRU
TUAN JAMES FOONG CHENG YUEN J.
[CIVIL SUIT NO: 22-262 OF 1990]
25 AUGUST 1992

INSURANCE LAW: Whether insurers can claim set off and counterclaim in their own name - No evidence of subrogation - Road Transport Act 1987 ss. 91, & 96 - Whether the provisions of s. 96 Road Transport Act mandatory.

The plaintiff sued the defendant claiming a judgment sum of RM15,317.56 together with interest which was the judgment entered against the defendant's insured in a claim brought by the plaintiff for the death of her son in a road accident.

The defendants contended that the plaintiff as executor of her son's estate was liable to their insured on a judgment awarded against their insured where the estate had been brought in as a third party and sought a set-off and counterclaim against the plaintiffs claim.

The plaintiff sought a declaration that *inter alia:*

(a) the judgment for RM15,317.56 was given in her favour as dependent of the deceased.
(b) the defendants do pay the plaintiff the said judgment sum
(c) the counterclaim of the defendants is wrong in law and be dismissed with costs.

Held:

[1] Section 96 Road Transport Act 1987 imposed a mandatory duty upon the insurers concerned to pay to the person entitled to the benefits of the judgment any sum payable thereupon. The defendants as insurers are liable to pay the judgment sum.

[2] Section 96 is an exception to the rule on privity and allows the plaintiff to proceed directly against the insurers. It does not provide the insurers a right to claim from the plaintiff.

[3] In the absence of any evidence of a formal assignment for subrogation, the defendants claim for set-off and counterclaim brought in their own name, should be dismissed.

[Prayer 2 and 3 of the plaintiffs application allowed with costs. No order as to prayer one].

Cases referred to:
Neo Seo Thun v. Ng Peng Hui [1975] 2 MLJ 56 ***(refd)***
London Assurance Co. v. Sainsbury [1783] 3 Doug K.B. 245 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7
Road Transport Act 1987, ss. 91, 96

For the plaintiff - N. Jegatheeson; (M/s. John Ang & Jega)
For the defendant - Ang Boon Heng; (M/s. H.H. Long & Co.)

JUDGMENT

James Foong Cheng Yuen J:
This is an application by way of a notice of motion by the plaintiff for:

(a) a declaration that by a judgment order dated 16 November 1989 for the sum of RM15,317.56 with interest thereon was given in favour of the plaintiff as dependent of one Khalid bin Salleh (deceased),
(b) that the defendants do pay the plaintiff the sum of RM15,317.56 with interest thereon, and
(c) a declaration that the counterclaim of the defendants dated 3 March 1991 is wrong in law and be dismissed with costs.

This application arose out of a writ of summons filed by the plaintiff against the defendants claiming a judgment sum of RM15,317.56 together with interest. The judgment sum is derived from a Court order granted by Mr. Justice Dato' Abu Mansor dated 16 November 1989 in Johor Bahru Court in civil suit No: 25-1679-86 where he awarded 70% liability against one Abd. Razak and South Johore Omnibus Co. Sdn. Bhd. (hereinafter referred to as the insured), as a result of a road accident involving a motor cycle ridden by the plaintiff's son (hereinafter referred to as the deceased) with a pillion rider by the name of Sulaiman bin Aziz (hereinafter referred to as Sulaiman) and, the insured motor bus. As a result of this motor accident, the plaintiff's son, the deceased, was killed. The balance of the 30% was attributed to the deceased.

This 70% amounts to a sum of RM15,317.56. The plaintiff is now seeking to enforce this judgment sum on the defendants as insurers of the insured motor bus at the material time under s. 96 of the Road Transport Act.

The defendants on the other hand contend that they have a set off against the plaintiff's claim up to a sum of 30% of RM91,843.12. This arose from a separate civil suit bearing High Court Johor Bahru No. 25-1110-86 filed by Sulaiman, the pillion rider of the motor cycle against the insured. The insured in this case brought in the deceased estate as a third party. This civil suit was consolidated with civil suit No: 25-1679-86.

Mr. Justice Dato' Abu Mansor's judgment order dated 16 November 1989 in respect of civil suit 25-1679-86 (which is also in the same judgment order in respect of case no. 25-1110-86) ordered *inter alia* that:

(i) the insured and the deceased be 70% and 30% liable to Sulaiman and
(ii) the insured do pay to Sulaiman the 100% of the damages while entitled to be indemnified by the deceased estate up to the extent of 30% of the sum awarded.

The defendants as insurers of the insured have already paid out to Sulaiman 100% of the award. When the plaintiff filed this claim, the defendants sought a set-off and counterclaim for the 30% from the amount they have paid off to Sulaiman.

The plaintiff contends that such set-off and counterclaim are not permissible under s. 91 of the Road Transport Act (RTA). Further, she alleged that the award given was granted on a dependency claim under s. 7 of the Civil Law Act. The judgment order dated 16 November 1989 for 30% indemnity was against the estate of the deceased. As dependent is different from that of the estate of the deceased, this claim of 30% by way of set off and counterclaim cannot succeed.

The defendants however argued that when the plaintiff made her claim against the insured in respect of the deceased, it was made both as dependent and as administratrix for the estate of the deceased. Therefore, even at p. 3 of the judgment order dated 16 November 1989, the words used to describe the plaintiff are "the dependent of the deceased and administratrix of the estate" of the deceased. In view of such circumstances all awards to the plaintiff should be merged and taken as payment to the estate of the deceased following the principle as laid down in *Neo Seo Thun v. Ng Peng Hui* [1975] 2 MLJ 56.

The plaintiff replied to state that she had abandoned the estate claim during the trial of the deceased's claim against the insured but,

unfortunately the defendants denied such an allegation and, there are no acceptable and proper records tendered to this Court as evidence of this matter.

After careful consideration I shall proceed to deal with prayer two and three of this application before reverting back to the first prayer in this application.

Prayer two of this application is for an order that the defendants do pay the plaintiff a sum of RM15,317.56 with interest and costs. This application is made in pursuance to s. 96 of the RTA where the insurers are under a liability, by way of statute, to pay a third party who is entitled to the benefit of a judgment obtained against an insured person who has a valid insurance policy as defined under s. 91(4) of the RTA with the insurers. This statutory provision provides an exemption to the law of privity in contract. It allows recovery of money by a third person who is not a party to the contract. By the use of the words "the insurer shall", statute has imposed a mandatory duty upon the insurers concerned to pay to the person entitled to the benefits of the judgment any sum payable thereupon. Therefore whether the plaintiff in this case has a judgment order obtained as a dependent or as an administratrix of the deceased estate, the defendants as insurers are liable to pay to the plaintiff the judgment sum. Therefore, under these circumstances I allow prayer two of this application.

As regards the third prayer of the plaintiff to strike out the defendants' claim for a set-off and counterclaim, the issue is whether such a set-off and counterclaim, can be entertained where the plaintiff's claim is proceeded with under s. 96 of the RTA. After due consideration I find that the defendants' set-off and counterclaim cannot be sustained in a claim under s. 96 of the RTA. The plaintiff's claim under s. 96 of the RTA is an entitlement provided for under statute and it is mandatory upon the defendants as insurers to pay a judgment order so obtained. As stated earlier, this right is an exception to the rule on privity and allows the plaintiff to proceed directly against the insurers. However the statute does not provide such a right to the insurers to claim from the plaintiff. This right only flows one way and that is only in favour of the plaintiff in this case. Such being the case, the defendants cannot make a set-off and counterclaim against the plaintiff, even if the defendants' claim against the plaintiff is one that is against the estate of the deceased and not as a dependent.

Still on the subject matter of the defendants' right to a set-off and counterclaim against the plaintiff, I find that the defendants are making such claims as insurers for their insured. The judgment order directed only the insured be indemnified of up to 30% of the sum of RM91,843.12 from the deceased estate. It never accords the insurers such a right to indemnity. The defendants as insurers can only possess such a right if there has been a subrogation. However, from the affidavits so filed by the defendants there is no evidence of any subrogation of his rights by the insured to the defendants.

Subrogation is not an automatic process given to an insurer by his insured so as to be placed in a position to be entitled to the advantages of all rights and remedies which the insured has against the third party in respect of the subject matter. There must be a formal assignment of the right of action and, an insurer cannot in the absence of such a formal assignment bring an action against a third party in their own name. See the case of *London Assurance Co. v. Sainsbury* [1783] 3 Doug KB 245.

However, in this case the defendants by claiming the set-off and counterclaim in an action brought against them as insurers are making a claim in their own name. In the absence of any evidence of a formal assignment for subrogation, such claim cannot be entertained and should be dismissed.

In view of the reasons I have stated aforesaid, I allow the plaintiff's third prayer in this application.

Now returning to the plaintiff's first prayer in this application, I find that there is no necessity for this Court to grant such a declaration. This prayer has no relevance to this civil suit in view of the aforesaid orders being granted, and I therefore shall make no orders thereto.

Prayer two and three of this application (enclosure 18) are hereby allowed with costs to the plaintiff.